

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Servitto, P.J., and Gleicher, Shapiro, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Case Nos. 143343 & 143344

v

COA Case Nos: 294630 & 295834

JARAD RAPP,

Defendant-Appellant.

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**BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY'S
BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

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I. STATEMENT OF QUESTION PRESENTED

Is Michigan State University Ordinance 15.05 facially unconstitutional under *City of Houston v Hill*, 482 US 451 (1987)?

Plaintiff-Appellee answers.....“Yes”

Defendant-Appellant answers..... “No”

The Court of Appeals answered..... “No”

Amicus Curiae answers..... “No”

II. STATEMENT OF INTEREST

The Board of Trustees of Michigan State University ("Amicus MSU Board") leaves the rendition of the underlying factual scenario to the litigants. Amicus MSU Board, an autonomous constitutional corporation, has the general power and obligation to oversee the safe operation of the university. Const 1963, art 8, § 5; MCL 390.102, 390.106; also, *Molony-Vierstra v Michigan State University*, 417 Mich 224, 226; 331 NW2d 473 (1983). Amicus MSU Board's enactment of Ordinance 15.05 was an exercise of prerogatives borne of its constitutional responsibility.

III. SUMMARY OF ARGUMENT

The contention that a given word, term, or statute is overbroad is a staple in advocacy, legal and otherwise. The child who is junior in a family's pecking order learns from wiser siblings that in traversing the shoals of parental oversight a ready defense when called to account for most forms of asserted bad behavior may be found in a statement that begins, "Oh, I thought you only meant that I wasn't allowed to...", or a rhetorical cousin. The skilled urchin may then allude to forms of mischief that are closely related to the conduct at issue and explain that he or she would never engage in *that* wrongdoing. The child's or the attorney's plaintive cry of uncertainty as to the reach of a given prohibition is sometimes true, sometimes smoke. In all events, rules must be stated. The law requires reasonableness, but not precision.

The law must necessarily embrace society's need for laws that are constructed so as to encompass disparate forms of impropriety that do not lend themselves to easy encapsulation, as well as fairness principles to guard against arbitrary enforcement. In this case, Defendant Rapp equates "interrupt", in the statute examined in *City of Houston v Hill* (*cit om*), with "disrupt", in the statute at issue in this matter. That words have a common syllable does not render the words synonymous. The words "refuse", "confuse", and "defuse" are no more harmonious in meaning than are "bankrupt" and "erupt". That "disrupt" and "interrupt" may not reasonably be regarded as synonyms comports with common understanding, and with the case law of consequence that has developed under *City of Houston v Hill*.

IV. ARGUMENT

A. STANDARD OF REVIEW

The constitutionality of a statute is reviewed *de novo*. *Tolksdorf v Griffity*, 464 Mich 1, 5; 626 NW2d 163 (2001). Statutes are presumed to be constitutional unless the unconstitutionality is clearly apparent. *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1991).

B. GOVERNING LEGAL PRINCIPLES

The overbreadth doctrine is a limited exception to the traditional standing rule that a person to whom a statute may constitutionally be applied may not challenge that statute on the basis that it may conceivably be applied in an unconstitutional manner to others not before the court. *Broadrick v Oklahoma*, 413 US 601, 93 S Ct 2908, 37 L Ed2d 830 (1973). When an enactment purporting to regulate both speech and conduct is challenged, the “overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Id.* at 615.

In *Los Angeles City Council v Taxpayers for Vincent*, 466 US 789, 800; 104 S Ct 2118, 80 L Ed2d 772 (1984), the Court explained that the “mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.” Rather, “there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.” *Id.* 466 US at 801. “[O]verbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner. *Broadrick, supra*, 413 US at 614. The court, in *Staley v Jones*, 239 F3d 769 (6th Cir, 2001), explained that “overbreadth

scrutiny diminishes as the behavior regulated by the statute moves from pure speech toward harmful, unprotected conduct.” *Id.*, at 785. The *Broadrick* Court termed application of the overbreadth doctrine “strong medicine” that had been used “sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.” *Id.*, at 613.

C. MSU ORDINANCE 15.05 IS FACIALLY CONSTITUTIONAL

Michigan State University Ordinance 15.05 provides:

No person shall disrupt the normal activity or molest the property of any person, firm, or agency while that person, firm, or agency is carrying out service, activity or agreement for or with the University.

MSU Ordinance 15.05. In *City of Houston v Hill*, 482 US 451; 107 S Ct 2502, 96 L Ed2d 398 (1987), an action was brought challenging the constitutionality of a city ordinance which made it illegal to, “in any manner, oppose, molest, abuse or interrupt a police officer in the execution of his duty.” *Hill, supra*, 461. In *Hill*, the Court considered whether an ordinance that made it unlawful to “interrupt” a police officer while in the performance of his or her duties was unconstitutionally overbroad under the First Amendment. The Supreme Court found that the ordinance was facially overbroad because “it criminalizes a substantial amount of, and is susceptible of regular application to, constitutionally protected speech, and accords the police unconstitutional enforcement discretion. . . .” *Id.* at 466-467.

A painful feature of the ordinance under review in *Hill, supra*, was that its proscription applied to one’s interruption “in any manner” of an on duty police officer. Circuit Judge Coffey of the United States Seventh Circuit has aptly noted that within the rubric of the ordinance of concern in *Hill, supra*, one’s reciting the *Magna Carta* so as to divert a Houston police officer’s attention would have sufficed to trigger the prospect of an arrest. See *Abrams v Walker*, 307 F3d

650, 656 (7th Cir, 2002). A review of thoughtful decisions rendered in the light of *Hill, supra*, shows that *Hill* has not been taken to say or to mean anything more than that which a straightforward appreciation of its holding requires.¹

In *Risbridger v Conelly*, 122 F Supp2d 857 (WD Mich, 2000), the court reviewed an East Lansing ordinance that provided, in pertinent part, that “No person shall . . . (19) assault, obstruct, resist, hinder, or oppose any member of the police force, any peace officer, or firefighter, in the discharge of his/her duties as such”. *Id.* at 861. The plaintiff had been arrested upon refusing to produce identification as a police officer had requested, after an investigatory, or Terry, stop, the propriety of which was unquestioned. Plaintiff Risbridger contended that East Lansing’s Ordinance 9.102(19) was overbroad because it allowed the police to demand identification from persons on the street and to treat noncooperation as obstructing or hindering the police, in violation of the ordinance. Mr. Risbridger asserted that such impermissibly impinged a substantial amount of protected free speech, as well as the right to free assembly. *Id.* at 871. The court rejected the overbreadth challenge because there was no evidence that the City had ever used the ordinance to effect an arrest based on constitutionally protected speech and failed to demonstrate the ordinance’s potential to chill First Amendment speech. *Id.* at 872, discussing and adopting a rationale that had been articulated in *Fair v City of Galveston*, 915 F Supp 873 (SD Tex, 1996), *aff’d*, 100 F3d 956 (5th Cir, 1996).

In *Risbridger, supra*, and in *Fair, supra*, the courts assigned jurisprudential significance to the fact that the ordinance in *City of Houston v Hill, supra*, prohibiting “interrupting” a police officer while engaged in work duties, was largely aimed at purely verbal conduct. The ordinances at issue in the *Fair* and *Risbridger* cases, prohibiting “obstructing” the police,

¹ In briefing this issue, Appellant did not trouble the Court with any case law that either cited *Hill, supra*, or that has been decided in the 25 years since *Hill* was decided.

implicat physical conduct. This aspect of meaning inheres in the common understanding suggested by the words “obstruct” and “disrupt”. The logic of *Risbridger* obtains here.

For present purposes, the most cogent analysis of *City of Houston v Hill, supra*, is perhaps found in *Rendon v Transportation Security Administration*, 424 F3d 475 (6th Cir, 2005). Mr. Rendon appealed a determination that he had “interfered” with an airport security screener in violation of a federal regulation. Due to the passenger’s loud, belligerent, and profanity-laced protestations, the screener had to shut down the line.

In *Rendon, supra*, the petitioning passenger argued that a rule prohibiting airline passengers from “interfering” with security screeners was legally comparable to the ordinance in *City of Houston v Hill, supra*, which proscribed speech “in any manner that interrupt[s] [a] policeman in the execution of his duty.” *Rendon, supra*, 480, citing *Hill, supra*, 482 US at 461. The Sixth Circuit Court of Appeals looked past the fact that the passenger had been loud and vulgar, and explained that the security regulation addressed *conduct*, that his speech aspect was incidental. *Rendon, supra*, at 478-480. Speech is at the heart of the City of Houston’s ordinance’s proscription. So, too, in the present case, Amicus MSU Board’s ordinance that is put at issue here inveighs against a person who would “disrupt” personnel who are engaged in activities and services for the institution. The focus is on conduct, not speech.²

In 2009, the constitutional propriety of Bloomfield Township Ordinance, No. 137, § 16.01(a), titled “Interference with Police Department” was considered in the context of a writ of habeas corpus filed following the petitioner’s conviction for interfering with a police officer, in *Lawrence v 48th District Court*, 560 F3d 475 (6th Cir, 2009). The ordinance provided:

² While the overbreadth doctrine was not directly at issue in *King v Ambts*, 519 F3d 607 (6th Cir, 2008), the court did reexamine its decision in *Risbridger, supra*, in the context of *City of Houston v Hill*. See, *King, supra*, and essentially reaffirmed that the feature of the ordinance in *City of Houston* having significance is its literal and actual impact on pure speech.

No person shall resist any police officer, any member of the police department or any person duly empowered with police authority while in the discharge or apparent discharge of his duty, or in any way interfere with or hinder him with the discharge of his duty.

See *id.* In rejecting Petitioner Lawrence's contention that the ordinance was overbroad under

Hill, supra, the court in *Lawrence, supra*, stated, in pertinent part, as follows:

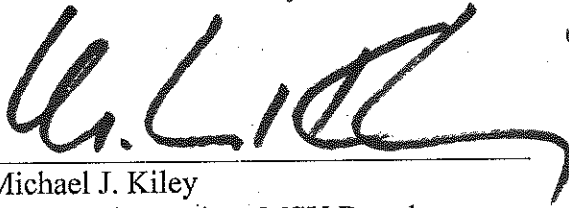
For overbreadth, *City of Houston v Hill* [*cit om*] does not provide the clearly established federal law necessary to grant Lawrence's habeas petition. . . . That the law [in *Hill*] prohibited interruption meant that the prohibited speech, as interruption suggests verbal interruption. [*cit om*] The ordinance here prohibits 'resist[ing]', 'interer[ing]', and 'hinder[ing]', none of which suggest speech, and on the contrary, suggest some kind of physical interference. Without any other United States Supreme Court decisions to support his claim, Lawrence's overbreadth argument fails.

Lawrence, supra, at 482. It may fairly be said that Petitioner Lawrence and Defendant Rapp stand in pretty much the same shoes.

V. CONCLUSION

The ordinance under review is not comparable or analogous to the ordinance that was found constitutionally wanting in *City of Houston v Hill, supra*. Amicus MSU Board may properly seek to ensure against its personnel being disrupted in carrying-out their responsibilities and such does not implicate anyone's free speech rights. Indeed, the salient aspects of the factual record here have to do with squealing tires, angry eyes and Mr. Rapp's menacing behavior that scared a parking enforcer into confining himself in a locked vehicle. This is not a speech case, and Amicus MSU Board's Ordinance 15.05 may not be read as though it stands, in any sense, in opposition to the First Amendment. The Court of Appeals decision ought to be upheld.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "M. J. Kiley", written over a horizontal line.

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Attorney for Amicus MSU Board

Dated: March 26, 2012